

# ARKANSAS SUPREME COURT

No. CR 08-154

JAMES BARNETT  
Petitioner

v.

STATE OF ARKANSAS  
Respondent

Opinion Delivered March 20, 2008

PRO SE MOTION FOR BELATED  
APPEAL [CIRCUIT COURT OF UNION  
COUNTY, CR 2005-707, HON.  
HAMILTON H. SINGLETON, JUDGE]

REMANDED.

## PER CURIAM

In 2006, petitioner James Barnett was found guilty by a jury of second-degree sexual assault and was sentenced to eighty-four months' incarceration. Petitioner was represented at trial by Gary McDonald.<sup>1</sup> No appeal was taken from the judgment of conviction, which was entered on November 22, 2006, and petitioner now seeks to proceed with a belated appeal pursuant to Ark. R. App. P.–Crim. 2(e), which permits a belated appeal in a criminal case in some instances. Petitioner contends that he asked Mr. McDonald to file an appeal from the judgment and counsel failed to do so.

It is the practice of this court when a pro se motion for belated appeal is filed in which the petitioner contends that he made a timely request to appeal, and the record does not contain an order relieving trial counsel, to request an affidavit from the trial attorney in response to the allegations in the motion. There is no order relieving Mr. McDonald in the record filed in this case. The

<sup>1</sup>It is unclear from the limited record tendered to this court whether Mr. McDonald was retained by petitioner or was appointed by the trial court. Additionally, the judgment entered in this matter listed another attorney as petitioner's attorney of record, which appears from all other information before us to be an error.

affidavit requested of trial counsel is required because Ark. R. App. P.–Crim. 16 provides in pertinent part that trial counsel, whether retained or court appointed, *shall* continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. We have held, however, that a defendant may waive his right to appeal by his failure to inform counsel of his desire to appeal within the thirty-day period allowed for filing a notice of appeal under Ark. R. App. P.–Crim. 2(a)(4). *Bankston v. State*, 354 Ark. 473, 125 S.W.3d 146 (2003) (per curiam).

Mr. McDonald in his affidavit states that he thoroughly discussed whether to appeal with petitioner and petitioner decided not to appeal. He further states that there was no communication between them after the decision was made while petitioner was waiting to begin his sentence of incarceration. It was only after petitioner had been incarcerated for several months that he wrote to trial counsel asking about the status of the appeal.

Petitioner's and counsel's claims pertaining to whether petitioner advised counsel that he desired counsel to appeal the judgment are in direct conflict. Because the proper disposition of the motion for belated appeal in this case requires findings of fact which must be made in the trial court, we remand this matter to the circuit court for an evidentiary hearing on the issue of whether counsel was informed by petitioner within the time period allowed for filing a notice of appeal that he desired to appeal. The trial court is directed to enter Findings of Fact and Conclusions of Law within ninety days and submit the findings and conclusions to this court with the transcript of the evidentiary hearing.

Remanded.